

IN THE SUPREME COURT OF THE STATE OF ALASKA

KEVIN MEYER, LIEUTENANT
GOVERNOR OF THE STATE OF
ALASKA and the STATE OF ALASKA,
DIVISION OF ELECTIONS,

Appellants,

v.

VOTE YES FOR ALASKA'S FAIR
SHARE,

Appellee.

Trial Court Case No. **3AN-19-11106 CI**

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
HONORABLE WILLIAM F. MORSE

**BRIEF OF APPELLANTS KEVIN MEYER,
LIEUTENANT GOVERNOR OF THE STATE OF ALASKA
AND THE STATE OF ALASKA, DIVISION OF ELECTIONS**

KEVIN G. CLARKSON
ATTORNEY GENERAL

/s/ Jessica M. Alloway
Jessica M. Alloway (1205045)
Assistant Attorney General
Department of Law
1031 West Fourth Avenue, Suite 200
Anchorage, AK 99501
(907) 269-5275

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AUTHORITIES PRINCIPALLY RELIED UPON

AS 15.45.090. Preparation of petition

(a) If the application is certified, the lieutenant governor shall prepare a sufficient number of sequentially numbered petitions to allow full circulation throughout the state. Each petition must contain

- (1) a copy of the proposed bill;
- (2) an impartial summary of the subject matter of the bill;
- (3) a statement of minimum costs to the state associated with certification of the initiative application and review of the initiative petition, excluding legal costs to the state and the costs to the state of any challenge to the validity of the petition;
- (4) an estimate of the cost to the state of implementing the proposed law;
- (5) the statement of warning prescribed in AS 15.45.100;
- (6) sufficient space for the printed name, a numerical identifier, the signature, the date of signature, and the address of each person signing the petition; and
- (7) other specifications prescribed by the lieutenant governor to ensure proper handling and control.

(b) Upon request of the initiative committee, the lieutenant governor shall report to the committee the number of persons who voted in the preceding general election.

AS 27.21.100. Public information and inspection

(a) An applicant for a permit shall file a copy of the application for public inspection at a location designated by the commissioner near the area of the proposed surface coal mining operation. The applicant may exclude from the copy filed under this subsection information that is confidential under (c) of this section.

(b) Copies of records, permits, inspection materials, data obtained under AS 27.21.120, or other information obtained under this chapter by the commissioner relating to a surface coal mining and reclamation operation, other than information that is confidential under (c) of this section, must be made immediately and conveniently available to the public at the district office of the department closest to the location of the surface coal mining and reclamation operation.

(c) Information

- (1) gathered from the proposed permit area included in the application for a permit and pertaining to coal seams, test borings, core samplings, or soil samples must be made available to any person with an interest that is or may be adversely affected, except that information that relates only to the analysis of the chemical and physical properties of the coal, other than information regarding the mineral or

elemental content that is potentially toxic in the environment, must be kept confidential and not made a matter of public record;

(2) in the applicant's reclamation plan relating to the competitive rights of the applicant, including but not limited to trade secrets, commercial or financial information, and geologic information specifically identified as confidential by the applicant and determined by the commissioner to be not essential for public review shall be kept confidential and not be made a matter of public record.

AS 15.45.180. Preparation of ballot title and proposition

(a) If the petition is properly filed, the lieutenant governor, with the assistance of the attorney general, shall prepare a ballot title and proposition. The ballot title shall, in not more than 25 words, indicate the general subject of the proposition. The proposition shall give a true and impartial summary of the proposed law. The total number of words used in the summary may not exceed the product of the number of sections in the proposed law multiplied by 50. In this subsection, "section" means a provision of the proposed law that is distinct from other provisions in purpose or subject matter.

(b) The proposition prepared under (a) of this section shall comply with AS 15.80.005 and shall be worded so that a "Yes" vote on the proposition is a vote to enact the proposed law.

AS 39.90.010. Obstruction of access to public information

(a) A public employee may not be dismissed, demoted, suspended, laid off, or otherwise made subject to any disciplinary action for communicating matters of public record or information under AS 40.25.110 and 40.25.120.

AS 40.25.100. Disposition of tax information

(a) Information in the possession of the Department of Revenue that discloses the particulars of the business or affairs of a taxpayer or other person, including information under AS 38.05.020(b)(11) that is subject to a confidentiality agreement under AS 38.05.020(b)(12), is not a matter of public record, except as provided in AS 43.05.230(i)-(l) or for purposes of investigation and law enforcement. The information shall be kept confidential except when its production is required in an official investigation, administrative adjudication under AS 43.05.405--43.05.499, or court proceeding. These restrictions do not prohibit the publication of statistics presented in a manner that prevents the identification of particular reports and items, prohibit the publication of tax lists showing the names of taxpayers who are delinquent and relevant information that may assist in the collection of delinquent taxes, or prohibit the publication of records, proceedings, and decisions under AS 43.05.405--43.05.499.

AS 40.25.120. Public records; exceptions; certified copies

(a) Every person has a right to inspect a public record in the state, including public records in recorders' offices, except

(1) records of vital statistics and adoption proceedings, which shall be treated in the manner required by AS 18.50;

(2) records pertaining to juveniles unless disclosure is authorized by law;

(3) medical and related public health records;

(4) records required to be kept confidential by a federal law or regulation or by state law;

(5) to the extent the records are required to be kept confidential under 20 U.S.C. 1232g and the regulations adopted under 20 U.S.C. 1232g in order to secure or retain federal assistance;

(6) records or information compiled for law enforcement purposes, but only to the extent that the production of the law enforcement records or information

(A) could reasonably be expected to interfere with enforcement proceedings;

(B) would deprive a person of a right to a fair trial or an impartial adjudication;

(C) could reasonably be expected to constitute an unwarranted invasion of the personal privacy of a suspect, defendant, victim, or witness;

(D) could reasonably be expected to disclose the identity of a confidential source;

(E) would disclose confidential techniques and procedures for law enforcement investigations or prosecutions;

(F) would disclose guidelines for law enforcement investigations or prosecutions if the disclosure could reasonably be expected to risk circumvention of the law; or

(G) could reasonably be expected to endanger the life or physical safety of an individual;

(7) names, addresses, and other information identifying a person as a participant in the Alaska Higher Education Savings Trust under AS 14.40.802 or the advance college tuition savings program under AS 14.40.803--14.40.817;

(8) public records containing information that would disclose or might lead to the disclosure of a component in the process used to execute or adopt an electronic signature if the disclosure would or might cause the electronic signature to cease being under the sole control of the person using it;

- (9) reports submitted under AS 05.25.030 concerning certain collisions, accidents, or other casualties involving boats;
- (10) records or information pertaining to a plan, program, or procedures for establishing, maintaining, or restoring security in the state, or to a detailed description or evaluation of systems, facilities, or infrastructure in the state, but only to the extent that the production of the records or information
 - (A) could reasonably be expected to interfere with the implementation or enforcement of the security plan, program, or procedures;
 - (B) would disclose confidential guidelines for investigations or enforcement and the disclosure could reasonably be expected to risk circumvention of the law; or
 - (C) could reasonably be expected to endanger the life or physical safety of an individual or to present a real and substantial risk to the public health and welfare;
- (11) Repealed by SLA 2018, Ch. 7, § 23.
- (12) records that are
 - (A) proprietary, privileged, or a trade secret in accordance with AS 43.90.150 or 43.90.220(e);
 - (B) applications that are received under AS 43.90 until notice is published under AS 43.90.160;
- (13) information of the Alaska Gasline Development Corporation created under AS 31.25.010 or a subsidiary of the Alaska Gasline Development Corporation that is confidential by law or under a valid confidentiality agreement;
- (14) information under AS 38.05.020(b)(11) that is subject to a confidentiality agreement under AS 38.05.020(b)(12);
- (15) records relating to proceedings under AS 09.58 (Alaska Medical Assistance False Claim and Reporting Act);
- (16) names, addresses, and other information identifying a person as a participant in the Alaska savings program for eligible individuals under AS 06.65;
- (17) artists' submissions made in response to an inquiry or solicitation initiated by the Alaska State Council on the Arts under AS 44.27.060;
- (18) records that are
 - (A) investigative files under AS 45.55.910; or
 - (B) confidential under AS 45.56.620.

AS 44.88.215. Confidentiality of records and information

(a) In order to promote the purposes of this chapter, unless the records or information were a matter of public record before submittal to the authority, the following records and information shall be kept confidential if the person supplying the records or information or the project, bond, loan, or guarantee applicant or borrower requests confidentiality and makes an adequate showing to the executive director of the authority that the records or information are

- (1) income tax returns;
- (2) financial statements, profit-and-loss statements, and cash flow projections, except the information required by the authority to calculate debt service coverage on the loan;
- (3) financial business plans;
- (4) credit reports from consumer reporting agencies and other credit information obtained from banks, creditors, or other credit reporting entities;
- (5) trade secrets, including confidential proprietary information and confidential information about products, pricing, or manufacturing or business processes;
- (6) appraisals, except the name of the appraiser, the date of the appraisal, and the fair market value determined for the property appraised;
- (7) market surveys and marketing strategy information; or
- (8) any information required to be kept confidential by a federal law or regulation or by state law.

(b) Information compiled by the authority from information described in (a) of this section shall be kept confidential unless disclosure is authorized by the person supplying the information and by the project, bond, loan, or guarantee applicant or borrower.

(c) The records and information that the executive director of the authority determines to be confidential under (a) or (b) of this section are not public records under AS 40.25.110--40.25.220.

...

JURISDICTION

This is an appeal from decisions of the superior court, the Honorable William F. Morse, granting summary judgment to Vote Yes for Alaska's Fair Share and denying the lieutenant governor's motion for additional findings or, in the alternative, reconsideration. This Court has jurisdiction over this case under AS 22.05.010(b) and Appellate Rule 202(a).

PARTIES

The appellants are Kevin Meyer, Lieutenant Governor of the State of Alaska, and the Alaska Division of Elections (collectively, "the State"). The appellee is Vote Yes for Alaska's Fair Share, the ballot initiative committee sponsoring 19OGTX ("the sponsors").

ISSUES PRESENTED

1. Ballot initiative 19OGTX includes a section titled "Public Records." It would make certain taxpayer information a "matter of public record." The lieutenant governor provided a ballot summary that described this section of the initiative as making "all filings and supporting information relating to the calculation and payment of the new taxes 'a matter of public record.' This would mean the normal Public Records Act process would apply." Did the lieutenant governor provide a true and impartial summary as required by AS 15.45.180(a)?

2. If the Court concludes that the lieutenant governor's ballot summary does not comply with AS 15.45.180(a), did the superior court abuse its discretion by denying

the lieutenant governor an opportunity to revise the ballot summary in a way that complies with the court's order?

INTRODUCTION

This case asks the Court to decide whether it cannot reasonably conclude the lieutenant governor's ballot summary for initiative 19OGTX is true and impartial as required by AS 15.45.180(a). To do so, the Court must decide to what extent the lieutenant governor may go beyond the sponsors' stated intent to accurately inform voters of the practical effects of the proposed initiative bill. The superior court believed that providing a neutral explanation of the legal import of the changes caused by the initiative constitutes partisan suasion. It does not. It simply informs the public about the legal context and consequences of an initiative. It does not put a thumb on the scale of voting for or against the initiative.

With certain exceptions, the Public Records Act exempts taxpayer information from the Act by declaring taxpayer information confidential and "not a matter of public record."¹ Ballot initiative 19OGTX flips this longstanding policy on its head.² For any taxpayer subject to a tax imposed by the proposed bill, that taxpayer's information would

¹ See AS 40.25.100(a); AS 40.25.120(a)(4).

² See *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, 642 P.2d 1316, 1320 n.13 (Alaska 1982) (stating that the Alaska Statutes have included language exempting tax records from the Public Records Act since 1947).

become a “matter of public record.” [Exc. 13–14] As with any public record, any person could then request this taxpayer information pursuant to the Public Records Act.³

Although it would create an entirely new category of “public records,” the proposed initiative makes no express mention of the Public Records Act, nor does it specify how the public may obtain these records or whether there are any exceptions from disclosure. [Exc. 13–14]

This Court has held that the basic purpose of a ballot summary “is to enable voters to reach informed and intelligent decisions on how to cast their ballots—decisions free from any partisan suasion.”⁴ This includes providing enough information “to convey an intelligible idea of the scope and import of the proposed law,”⁵ and may include accurately informing voters of the effects of the proposed bill,⁶ especially when such information may give the elector serious grounds for reflection.⁷ In other words, the ballot summary requires something more than a mere recitation of the proposed initiative’s language.

³ AS 40.25.120(a); *see also* *Griswold v. Homer City Council*, 428 P.3d 180, 186 (Alaska 2018) (“The Public Records Act applies to all public records in the state including public records of municipalities.”).

⁴ *Alaskans for Efficient Gov’t, Inc. v. State*, 52 P.3d 732, 735 (Alaska 2002).

⁵ *Id.*

⁶ *See Burgess v. Alaska Lieutenant Governor Terry Miller*, 654 P.2d 273, 276 (Alaska 1982) (upholding ballot summary that accurately stated the proposed bill’s effects).

⁷ *Alaskans for Efficient Gov’t*, 52 P.3d at 736.

Here, faced with a proposed initiative bill that would implicitly amend the Public Records Act by creating a new category of public records, the lieutenant governor drafted a ballot summary that provides:

The act would also make all filings and supporting information relating to the calculation and payment of the new taxes “a matter of public record.” This would mean the normal Public Records Act process would apply.

[Exc. 60]

The sponsors bear the burden of showing that the ballot summary is misleading or biased.⁸ The Court should reject the sponsors’ attempt to make this a dispute over the lieutenant governor’s subjective intent. It should similarly reject any attempt to make this a dispute over statements made by the lieutenant governor or the Department of Law that do not appear in the ballot summary. The actual language contained in the ballot summary would accurately inform voters that certain taxpayer records would become a matter of public record, available by request under the Public Records Act.⁹ The summary makes no conclusion about whether the Department of Revenue may invoke one of the many exceptions listed within the Public Records Act to deny disclosure. Such a decision can only be made once the Department of Revenue receives and reviews a request for taxpayer documents.

For these reasons, the Court should reverse the superior court’s grant of summary judgment to the sponsors and uphold the ballot summary as drafted. Alternatively, the

⁸ *Planned Parenthood of Alaska v. Campbell*, 232 P.3d 725, 727 (Alaska 2010).

⁹ *See* AS 40.25.120(a)(1)–(18) (listing exceptions).

Court should allow the lieutenant governor to amend the ballot summary in a way that is consistent with the Court’s opinion.

STATEMENT OF THE CASE

I. Proposed initiative 19OGTX would amend Alaska’s oil production tax and convert certain taxpayer information into a matter of public record.

In August 2019, Vote Yes for Alaska’s Fair Share filed initiative application 19OGTX with the Division of Elections; the proposed bill is titled: “An Act relating to the oil and gas production tax, tax payments, and tax credits.” [Exc. 58]

Ballot initiative 19OGTX would amend the oil and gas production tax system by increasing the tax imposed on certain oil production on the North Slope when the company produced more than 40,000 barrels of oil per day in the prior year and more than 400 million barrels of total cumulative production. [Exc. 13–14]. The initiative bill would also eliminate the applicability of certain tax credits and other tax incentives. [Exc. 13–14].

Relevant to this appeal, 19OGTX would change the character of taxpayer disclosures and supporting information. [See Exc. 13–14] Section 1 of the proposed bill includes a “notwithstanding” clause clarifying that the bill would amend existing statutes—“Notwithstanding any other statutory provisions to the contrary, the oil and gas production tax in AS 43.55 shall be amended as follows.” [Exc. 13] Section 7 is titled “Public Records.” It provides:

All filings and supporting information provided by each producer to the Department [of Revenue] relating to the calculation and payment of the taxes set forth in Sections 3 and 4 shall be a matter of public record.

[Exc. 14]

There is no dispute that section 7 of the initiative would affect the Public Records Act.¹⁰ Alaska Statute 40.25.100(a), which is a provision within the Act,¹¹ provides

[i]nformation in the possession of the Department of Revenue that discloses the particulars of the business or affairs of a taxpayer or other person . . . is not a matter of public record, except as provided in AS 43.05.230(i)–(l) or for purposes of investigation and law enforcement. The information shall be kept confidential except when its production is required in an official investigation, administrative adjudication under AS 43.05.405–43.05.499, or court proceeding. . . .

Indeed, since as early as 1947, Alaska statutes have consistently segregated “the business or affairs of a taxpayer” from disclosure as public records.¹² Ballot initiative 19OGTX would reverse this longstanding policy and supersede this provision of the Public Records Act. Yet, despite this change, the proposed initiative does not mention the Public Records Act, explain how the public will obtain these records, or state whether any exception to disclosure may apply. [See Exc. 13–14]

II. The sponsors filed suit to challenge the lieutenant governor’s petition summary, subsequently changing it to a challenge of the ballot summary.

After receiving the petition application, the lieutenant governor requested an opinion from the Department of Law on whether the 19OGTX initiative should be

¹⁰ In their complaint as well as their motion for summary judgment, the sponsors acknowledge as “correct” an interpretation that section 7 supersedes the provision within the Public Records Act categorizing all taxpayer information as confidential and not a matter of public record. [Exc. 10, 86]

¹¹ The Public Records Act is codified in AS 40.25.100–40.25.295.

¹² *City of Kenai*, 642 P.2d at 1320 n.13.

certified. [*See* Exc. 93 (“You asked us to review an application for an initiative bill”)] Consistent with its historic practice, the Department of Law prepared an attorney general opinion that, in addition to providing a recommendation regarding certification with proposed language for a petition summary, discussed potential interpretation and implementation issues with the initiative bill to help the lieutenant governor understand what the proposed bill would do. [*See* Exc. 93–105] The scope of this attorney general opinion was no different than the myriad of other attorney general opinions the Department of Law has issued on initiatives. [*Compare* Exc. 93–105 with Exc. 236–52]

The lieutenant governor certified the application in October 2019, sending notice of certification and a copy of the attorney general opinion to the sponsors. [Exc. 5; 93–105] Alaska Statute 15.45.090(a)(2) requires the lieutenant governor to provide “an impartial summary of the subject matter of the bill” with each petition. The summary provided with the petitions included the proposed language from the attorney general opinion. [Exc. 5; 103–04]

Regarding section 7, the public records provision, the petition summary provided a more detailed conclusion than the now-challenged ballot summary. The petition summary stated:

The Act would also make all tax documents relating to the calculation and payment of the new taxes a matter of public record. This would mean the documents would be reviewed under the normal Public Records Act process, and any information that needed to be withheld, for example for privacy or balance-of-interests reasons, would be withheld.

[Exc. 104] The summary’s conclusion that the Department of Revenue may still withhold taxpayer information for privacy or balance-of-interest reasons was based on the attorney general opinion’s conclusion that these records would be subject to the exclusions listed within the Public Records Act.¹³ [Exc. 98]

In November 2019, the sponsors filed a complaint contending that the petition summary failed to impartially describe three different sections of the proposed initiative. [Exc. 1–12] Despite alleging the petition summary was “improper as a matter of law,” the sponsors did not request that the petition summary be corrected.¹⁴ [Exc. 6, 11] Instead, the sponsors asked that the allegedly improper petition summary be circulated, with an injunction requiring the lieutenant governor to rewrite the summary for the ballot. [Exc. 11] The superior court did not resolve the sponsors’ challenge to the petition summary.

In March 2020, the lieutenant governor notified the sponsors that they had properly filed 19OGTX and provided them a copy of the final language for the ballot summary. [Exc. 59–61] The final ballot summary contained different descriptions for all three of the challenged sections from the petition summary. [Exc. 59–60] The revised summary language for the public records provision stated:

The act would also make all filings and supporting information relating to the calculation and payment of the new taxes “a matter of public record.” This would mean the normal Public Records Act process would apply.

¹³ See AS 40.25.120(a).

¹⁴ See AS 15.45.240 (allowing an aggrieved party to challenge a determination made by the lieutenant governor within thirty days of the date on which notice of the determination was given).

[Exc. 60]

The sponsors did not amend their complaint or file a new complaint to challenge the ballot summary. Instead, the State received notice of the sponsors’ desire to challenge the ballot summary during informal communications in April, nearly a week after the 30-day deadline to challenge the ballot summary had already expired.¹⁵ [R. 303]

Given the different language contained in the final ballot summary, the only remaining dispute between the parties is over section 7, the public records provision of the proposed initiative. [See Exc. 298]

III. The superior court orders the lieutenant governor to delete a sentence from the ballot summary and denies him the opportunity to draft alternative language.

In May 2020, the parties briefed cross-motions for summary judgment. [Exc. 34–280] The superior court ruled in favor of the sponsors, relying primarily on the attorney general opinion to support its finding that the summary was biased with partisan suasion. [Exc. 288–05] Citing AS 27.21.100,¹⁶ AS 44.88.215(a),¹⁷ and AS 39.90.010(a), the superior court concluded the phrase “‘a matter of public record’ is often used as shorthand to mean information or documents are not [to] be kept confidential but will be available for public inspection.” [Exc. 301]

The superior court then found fault with the sentence—“This would mean the normal Public Records Act process would apply”—by reading into that sentence a

¹⁵ *See id.*

¹⁶ The superior court mistakenly cited AS 27.21.110. [Exc. 299]

¹⁷ The superior court mistakenly cited AS 44.85.215. [Exc. 300]

conclusion that does not exist in the ballot summary. [Exc. 297–305] It concluded that by saying the “normal Public Records Act process would apply” the lieutenant governor was informing voters that “the producers could still assert statutory exceptions to public access and thus records would remain confidential.” [Exc. 366] It explained:

By telling the public that section 7 would not only make all filings and supporting documents “a matter of public record,” but also that “[t]his would mean the normal Public Records Act process would apply[,]” Meyer weighs in on the dispute over the meaning of section 7. He does not reveal that there is a dispute over the meaning of “a matter of public record.” He does not indicate that it is unclear whether the exceptions to disclosure of public records, contained in AS 40.25.120, might apply to some of the producers’ filings. Instead, he places his finger on the scales and affirmatively states that section 7 does not mean or accomplish what its sponsors say was their intent or would be the effect of the initiative.

[Exc. 303] The superior court concluded “[t]he most impartial resolution of the meaning of section 7 and the impact it would have on public access to the producers’ filings is to say nothing about the Public Records Act.” [Exc. 304] It then ordered the lieutenant governor to strike the disputed sentence from the ballot summary. [*Id.*]

The State filed an expedited motion to make additional findings and amend the court’s order pursuant to Alaska Rule of Civil Procedure 52(b), or alternatively, a motion for clarification. [Exc. 307–10] It asked the court to (1) clarify its order and make clear that the lieutenant governor may replace the deleted sentence with additional language that complies with the court’s order; or (2) consider and make findings on the lieutenant governor’s proposed revision. [Exc. 309] The State offered to replace the deleted sentence with a new sentence that would state: “The act does not specify the process for

disclosure of the public records and whether any exceptions may apply.” [Exc. 308] The superior court denied the State’s motion without explanation. [Exc. 328]

This initiative will be placed on the general election ballot in November, and the Court granted the State’s unopposed motion to expedite this appeal. [Order Expedite Appeal, July 1, 2020]

STANDARD OF REVIEW

This Court reviews a summary judgment decision de novo¹⁸ and applies its independent judgment when interpreting statutes.¹⁹ The Court adopts the “rule of law that is most persuasive in light of precedent, reason, and policy.”²⁰ A motion for clarification is treated as a motion for reconsideration and reviewed for an abuse of discretion.²¹

When reviewing a ballot summary, the Court gives deference to the lieutenant governor’s summary.²² If “reasonable minds may differ,” the Court will uphold the ballot summary.²³ It “will not invalidate the summary simply because [it] believe[s] a better one could be written; instead, the lieutenant governor’s summary [will] be upheld unless [the

¹⁸ *State v. Schmidt*, 323 P.3d 647, 654 (Alaska 2014).

¹⁹ *Id.* at 655.

²⁰ *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 90 (Alaska 2016) (citation omitted).

²¹ *Brennan v. Brennan*, 425 P.3d 99, 105 (Alaska 2018).

²² *Planned Parenthood of Alaska*, 232 P.3d at 729.

²³ *Burgess*, 654 P.2d at 276 n.7.

Court] cannot reasonably conclude that the summary is impartial and accurate.”²⁴ The sponsors bear the burden of showing that the ballot summary was misleading or biased.²⁵

ARGUMENT

I. The ballot summary accurately and impartially describes the proposed initiative as well as its effect on the Public Records Act.

Voters will receive an election pamphlet containing four statements: the sponsors’ statement, an opposition statement, a statement by the Legislative Affairs Agency, and a ballot summary prepared by the lieutenant governor.²⁶ Each of these statements serve fundamentally different roles. The sponsors and opponents to the proposed initiative will use their statements to persuade the public to support their respective positions. The Legislative Affairs Agency assists the legislature with research on and analysis of proposed legislation.²⁷ It must provide a “neutral” summary of the proposed initiative,²⁸ whereas AS 15.45.180(a) requires the lieutenant governor, with the assistance of the attorney general, to provide a “true and impartial” ballot summary. Its basic purpose “is to enable voters to reach informed and intelligent decisions on how to cast their ballots—decisions free from any partisan suasion.”²⁹

²⁴ *Planned Parenthood of Alaska*, 232 P.3d at 729 (internal citations and quotations omitted; third alteration in original).

²⁵ *Id.*

²⁶ AS 15.58.020(a)(6).

²⁷ *State v. Haley*, 688 P.2d 305, 309 (Alaska 1984) (citing AS 24.20.010).

²⁸ AS 15.58.020(a)(6)(D).

²⁹ *Planned Parenthood of Alaska*, 232 P.3d at 730 (quoting *Alaskans for Efficient Gov’t*, 52 P.3d at 735).

The sponsors contend, and the superior court held, that the lieutenant governor’s ballot summary must be consistent with the sponsors’ vision of their initiative. [Exc. 304] But a summary that is limited to the sponsors’ interpretation of their proposed bill, and not the actual effects of the bill itself, is not a summary free from partisan suasion. It is just another sponsors’ statement.

Similarly, a summary that simply restates the language of a proposed initiative does not serve its purpose of helping voters “reach informed and intelligent decisions.”³⁰ The summary requires something more. It “should be ‘complete enough to convey an intelligible idea of the scope and import of the proposed law,’” while being “‘free from any misleading tendency, whether of amplification, of omission, or of fallacy.’”³¹ If “the information would give the elector ‘serious grounds for reflection’ . . . it must be disclosed.”³²

Here, the lieutenant governor’s ballot summary is true and impartial because it accurately educates voters on the scope and import of the proposed law by informing them that certain taxpayer records, previously defined as confidential and exempted from the scope of the Public Records Act, would now be available under that Act. It is consistent with the plain language of the initiative—the section at issue is titled “Public Records” and states that these taxpayer documents would now be a “matter of public

³⁰ See *Alaskans for Efficient Gov’t*, 52 P.3d at 735.

³¹ *Id.* (quoting *Hope v. Hall*, 316 S.W.2d 199, 869 (Ark. 2002)).

³² *Pebble Ltd. Partnership ex rel. Pebble Mines Corp. v. Parnell*, 215 P.3d 1064, 1082 (Alaska 2009).

record.” And, it is the interpretation that is consistent with this Court’s prior precedent as well as the interpretation that will most likely avoid constitutional concerns post-enactment. This Court has previously held that the Public Records Act applies to all public records³³ and recognized an obligation by the Department of Revenue, when collecting financial information, to exercise due regard for a citizen’s privacy rights.³⁴

A. The Court should limit its review to only considering whether the language in the ballot summary is true and impartial.

The attorney general opinion given to the lieutenant governor regarding this proposal, as well as the lieutenant governor’s prior work history or personal opinions regarding this initiative, are not relevant to whether the ballot summary itself is biased or misleading. It is the ballot summary the voters see. And it is the impartiality and accuracy of the summary that is important. The superior court erred in interpreting the summary through the lens of information that will not be provided to the voters.

In this case, the sponsors take issue with one sentence: “This would mean the normal Public Records Act process would apply.” Under their interpretation of 19OGTX, the Department of Revenue would have to disclose without exception all taxpayer information relating to the calculation and payment of the taxes established through their initiative. The sponsors argue that the lieutenant governor, by stating that the Public Records Act would apply, has unlawfully taken a position that all taxpayer documents would remain confidential. [Exc. 161–63] This is not what the summary says.

³³ *Griswold*, 428 P.3d at 186.

³⁴ *See State, Dep’t of Revenue v. Oliver*, 636 P.2d 1156, 1168 (Alaska 1981).

To support this interpretation, the sponsors—and the superior court—had to look beyond the language contained in the ballot summary and rely on a separate analysis provided to the lieutenant governor by an attorney general opinion. [Exc. 160–61; 301–02] The attorney general had suggested that, after reviewing the documents, the Department of Revenue would *likely* withhold many of the requested documents for reasons of privacy, proprietary information, or balance of interests. [Exc. 204] In reality, however, neither the parties nor the Department of Revenue know how this initiative will be implemented if enacted. The Department of Revenue will need to review any request, review the documents subject to that request, and make a determination. That determination will be subject to judicial review just like any other determination made under the Public Records Act.³⁵

Neither the sponsors, nor the superior court, cite any authority to support a position that the ballot summary may be held invalid because of a legal analysis that is not actually included in the summary itself. This Court has never looked to the lieutenant governor’s political leanings, or statements he made that were not included in the ballot summary, to conclude that the ballot summary was misleading or biased.³⁶

³⁵ See AS 40.25.124.

³⁶ See, e.g., *Planned Parenthood of Alaska*, 232 P.3d at 730–31 (upholding superior court’s decision that petition summary was invalid because it omitted criminal enforcement provisions); *Alaskans for Efficient Gov’t*, 52 P.3d at 736–37 (concluding that the language in the ballot summary could mislead voters into thinking that further decisions and cost information about moving the capital would occur in secret).

Nor are the lieutenant governor's personal opinions relevant. The Missouri Court of Appeals has directly addressed what it will consider when reviewing ballot summaries.³⁷ Similar to Alaska, Missouri requires its summaries to "be adequate and state the consequences of the initiative without bias, prejudice, deception, or favoritism."³⁸ When considering whether the language of a ballot summary is fair and sufficient, Missouri courts do not judge the subjective intent of the secretary of state who drafts the summaries; the courts judge only "the final product . . . i.e., the actual language of the ballot summary."³⁹ They will not participate in a "foray into the state of mind of the summary's drafters."⁴⁰ They reject, as irrelevant, any evidence regarding the drafters' motives or subjective intent.⁴¹

Alaska's lieutenant governor, just like Missouri's secretary of state, is an official elected in a partisan statewide election. He is likely to have positions on many important issues, and he should be encouraged, not discouraged, from seeking the attorney general's legal counsel. Although the lieutenant governor may have a position on this petition, including legal concerns about how this law will be implemented, this Court should limit its inquiry to the language of the actual summary. It should not accept the

³⁷ *State ex rel. Kander v. Green*, 462 S.W.3d 844, 850 (Mo. Ct. App. 2015).

³⁸ *Id.* (internal quotation marks omitted).

³⁹ *Id.* at 849 (internal quotation marks and citation omitted).

⁴⁰ *Id.*

⁴¹ *Id.* (alteration in original) (quoting *State ex rel. Humane Soc'y of Missouri v. Beetem*, 317 S.W.3d 669, 673 (Mo. Ct. App. 2010)).

sponsors' request to make the review of ballot summaries a foray into the state of mind of an elected official.

B. The Court's precedent not only permits but requires summaries to include the legal import of initiatives, which is precisely what this summary does.

In *Burgess v. Alaska Lieutenant Governor Terry Miller*, the first case addressing the adequacy of an initiative petition summary, this Court rejected the notion that a ballot summary should not contain any statements regarding a proposed bill's effect.⁴² As in this case, the sponsors argued that the lieutenant governor's summary contained a "false" statement.⁴³ There, the allegedly false statement was that the "the proposed bill would eliminate all subsistence hunting preferences in Alaska."⁴⁴ In upholding the ballot summary, the Court found that the summary statement regarding the proposed bill's effect was "amply supported by the text of the bill" and was therefore neither misleading nor inaccurate.⁴⁵

And in *Planned Parenthood of Alaska v. Campbell*, this Court held that omitting relevant legal context rendered a ballot summary legally deficient.⁴⁶ One of the critical omissions in that case was that the ballot initiative modified and revalidated a law that this Court already determined unconstitutional.⁴⁷ The Court concluded that the ballot

⁴² 654 P.2d at 276.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ 232 P.3d at 730.

⁴⁷ *Id.*

summary had to inform the voters of this legal background and explain the difference between the unconstitutional law and this new initiative.⁴⁸ It believed this legal context was critical in that it would give electors information that could cause serious reflection.⁴⁹

Looking to the language contained within the ballot summary, there is no basis to conclude the disputed statement is either biased or misleading. The Public Records Act currently excludes all taxpayer information from its scope by expressly stating that it is “not a matter of public record” and must be kept confidential except in certain circumstances.⁵⁰ Ballot initiative 19OGTX provides that, “notwithstanding” this statutory provision to the contrary, “[a]ll filings and supporting information provided by each producer to the Department [of Revenue] relating to the calculation and payment of taxes set forth in Sections 3 and 4 *shall be a matter of public record.*” [Exc. 14 (emphasis added)] This section is expressly titled “Public Records.”

There is nothing biased or misleading about the lieutenant governor explaining to voters that this new category of “public records” would be made available under the normal Public Records Act process. Indeed, this Court has previously said that “[t]he Public Records Act applies to all public records in the state.”⁵¹ Omitting any mention of the Public Records Act, as the superior court required, would deprive voters of important legal context. Without this information, the public may be misled in its understanding of

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ AS 40.25.100(a).

⁵¹ *Griswold*, 428 P.3d at 186.

what a “public record” is, i.e., a record that is available to the public pursuant to the Public Records Act.

The superior court’s idea of the “most impartial resolution of section 7” is not the standard for invalidation. [See Exc. 304] The standard is whether the court cannot reasonably conclude that the summary is impartial and accurate. The lieutenant governor’s summary clearly satisfies this standard.

C. The lieutenant governor’s interpretation could save the initiative from future constitutional challenge.

If the lieutenant governor is faced with summarizing a proposed initiative with multiple possible constructions, this Court will uphold an interpretation that avoids potential constitutional concerns.⁵² In *Pebble Ltd. Partnership ex rel Pebble Mines Corp v. Parnell*, the lieutenant governor, following advice provided by the Department of Law, construed the word “effect” in the proposed initiative to mean “adversely affect.”⁵³ The lieutenant governor included this interpretation in his ballot summary, and this Court upheld that interpretation and the ballot summary.⁵⁴

The Court explained that its duty when “conducting a preelection review of an initiative is similar to the court’s duty when reviewing an enacted law.”⁵⁵ It will “employ a sliding scale approach under which [t]he plainer the statutory language is, the more

⁵² *Pebble Ltd. Partnership*, 215 P.3d at 1075–76.

⁵³ *Id.* at 1070.

⁵⁴ *Id.* at 1075–76, 1082–84.

⁵⁵ *Id.* at 1075 (internal quotation marks omitted).

convincing the evidence of contrary legislative purpose or intent must be.”⁵⁶ And, whenever possible, the Court “will construe a statute in light of its purpose” and in a way that preserves its constitutionality.⁵⁷

In *Pebble*, had the Court required the lieutenant governor to strictly construe the initiative in accordance with its plain language, the initiative would have been an impermissible appropriation and not certifiable.⁵⁸ Instead, the Court upheld the lieutenant governor’s interpretation, which was not only consistent with the purpose of the initiative, but was the interpretation that was most likely to preserve its constitutionality.⁵⁹

Not only is the lieutenant governor’s interpretation “amply supported by the text of the bill,”⁶⁰ but it is the interpretation that is most likely to preserve the initiative’s constitutionality. Assuming the initiative becomes law, this case will not resolve whether the Department of Revenue may withhold a taxpayer’s information based on one of the enumerated exceptions to the Public Records Act. But a ruling in the State’s favor will preserve that possibility.

This Court has said that the Department of Revenue, “in its information-gathering activities, must demonstrate a due regard for individuals’ privacy rights.”⁶¹ Similarly,

⁵⁶ *Id.* at 1075–76 (internal quotation marks omitted; alteration in original).

⁵⁷ *Id.* at 1076 (internal quotation marks omitted).

⁵⁸ *Id.* at 1071; *see also id.* at 1075

⁵⁹ *Id.* at 1076–77.

⁶⁰ *See Burgess*, 654 P.2d at 276.

⁶¹ *Oliver*, 636 P.2d at 1168.

federal courts have concluded that, although not a fundamental right, “citizens are entitled to some protection from government disclosure of financial information.”⁶² If the sponsors are correct, and the Court concludes that any “matter of public record” falls outside the scope of the Public Records Act and must be disclosed with no exceptions, the constitutionality of the initiative would be placed in question. Separately, if the superior court’s order is upheld, and the lieutenant governor is prohibited from saying anything about the Public Records Act or its applicability, then the voters are being deprived of the opportunity to truly understand the scope and import of this bill.

The Court should defer to the lieutenant governor and uphold the language of the ballot summary because it informs voters about the initiatives effect on the Public Records Act, is supported by the text of the initiative, and is the interpretation that is most likely to avoid constitutional concerns.

D. None of the statutes cited by the sponsors support their position that the Public Records Act does not apply to a “matter of public record.”

In granting the sponsors’ motion for summary judgment, the superior court found persuasive their reliance on three Alaska statutes that include the phrase “a matter of public record”: AS 27.21.100, AS 44.88.215(a), and AS 39.90.010(a). [Exc. 299–300] None of these statutes exempt “a matter of public record” from the Public Records Act. None of the statutes, therefore, undercut the lieutenant governor’s explanation that the normal Public Records Act process applies to matter of public record.

⁶² *Taylor v. United States*, 106 F.3d 833, 837 (8th Cir. 1997).

Alaska Statute 27.21.100(a) provides that an applicant for a permit for coal mining must file a copy of the application for public inspection at a location designated by the commissioner, excluding from the copy any information that is “confidential” under section (c). Alaska Statute 27.21.100(c) identifies information that must be kept confidential and information that may be kept confidential and “not be made a matter of public record.”

Alaska Statute 44.88.215(a) addresses records submitted to the Alaska Industrial Development and Export Authority. It provides a process for a person supplying information to keep certain records “confidential” as long as those records were not “a matter of public record” prior to submittal.

Last, AS 39.90.010 provides that a “public employee may not be dismissed, demoted, suspended, laid off, or otherwise made subject to any disciplinary action for communicating matters of public record or information under AS 40.25.110 and 40.25.120.” Importantly, to qualify for protection under this statute, the public employee must have communicated the “matter of public record” under the provisions of the Public Records Act, i.e., AS 40.25.110 and 40.25.120.

These statutes do not support the conclusion that this Court would need to reach to invalidate the ballot summary—that a “matter of public record” is somehow exempt from the normal Public Records Act process. In looking to these statutes, the superior court accepted the sponsors’ invitation to look beyond the ballot summary and find bias in the petition summary and attorney general opinion. It was the attorney general opinion and petition summary that concluded a taxpayer’s information may be withheld on other

grounds. [Exc. 98; 103–04] But the superior court and sponsors both ignore the fact that the ballot summary contains different language. It does not express any conclusions about whether the documents may be withheld on other grounds; it simply says that the normal Public Records Act process will apply. Any question about whether the documents may be withheld under one of the many exceptions to the Public Records Act is rightfully left for another day.

The statutes relied on by the superior court may be relevant to resolving the dispute over the exceptions; they do not, however, support a conclusion that a “matter of public record” is completely exempt from the Public Records Act. This Court has previously said that “all public records” are subject to the Act.⁶³ The Court has also said that it will defer to the lieutenant governor even in those situations where “reasonable minds may differ.”⁶⁴ The sponsors’ interpretation of the language contained in their initiative is not reasonable and would destroy the deference due to the lieutenant governor. The Court should uphold the ballot summary as an accurate description of what the proposed bill would accomplish.

II. Alternatively, if the Court finds the ballot summary is biased or misleading, it should allow the lieutenant governor to revise the ballot summary in a way that is consistent with the Court’s decision.

The superior court abused its discretion by denying the lieutenant governor’s request to revise the ballot summary. [Exc. 328] This Court has previously granted the

⁶³ *Griswold*, 428 P.3d at 186.

⁶⁴ *Burgess*, 654 P.2d at 276 n.7.

lieutenant governor such leeway,⁶⁵ in one case even proposing revised language.⁶⁶ Should the Court agree with the superior court and find the ballot summary biased or misleading, the lieutenant governor requests the ability to revise the summary in a way that complies with the Court's order. The State proposes to replace the deleted sentence with a new sentence: "The act does not specify the process for disclosure of the public records and whether any exceptions may apply." This is a neutral, factual statement that accurately describes the language of the initiative.

The ballot summary is misleading if it does not mention the Public Records Act because the initiative clearly impacts that Act and voters are entitled to know the scope of the proposed law. If the ballot summary cannot mention the Public Records Act, the ballot summary is misleading without the proposed revision because the voters would have no way of knowing the uncertainty over the initiative's meaning or scope. The

⁶⁵ *Planned Parenthood*, 232 P.3d at 734 ("Provided that the summary is corrected and provided that the PCA and the enforcement provisions implicated by the PNI are made available to the voters along with the PNI, we conclude that the integrity of the initiative process, along with our adherence to standards that favor the people's right to enact laws by initiative and that favor voters' rights to be informed about proposed initiative measures, will be maintained." (footnotes omitted)); *Alaskans for Efficient Gov't.*, 52 P.3d at 737 (reversing the superior court and remanding "to the lieutenant governor with directions to revise the summary as necessary to comply with this order").

⁶⁶ *Alaskans for Efficient Gov't.*, 52 P.3d at 737 (proposing revised language so that the disputed sentence "would read: 'The bill would repeal the requirements that before the state can spend money to move the legislature, the voters must *be informed of* the total costs as *would be* determined by a commission, and approve a bond issue for all bondable costs of the move'").

superior court abused its discretion by denying the State's request without giving deference to the lieutenant governor's proposed revisions.⁶⁷

CONCLUSION

Rather than specifically identifying its changes for the voters, the initiative's drafters used the "notwithstanding" clause, which obscured the scope of the changes that the initiative would make to existing law. The ballot summary's reference to the Public Records Act is needed to inform voters of the initiative's scope and allow them an opportunity for serious reflection. Even in situations where reasonable minds may differ, the Court will defer to the language provided by the lieutenant governor. For these reasons, the Court should reverse the superior court's decision granting summary judgment to the sponsors and direct the entry of judgment in favor of the State.

⁶⁷ *Planned Parenthood of Alaska*, 232 P.3d at 729.